

Cumming and Giles, Meet Jenkins and Shaw: **Voting Rights and Education in the Two Reconstructions**

Historical explanations are inherently comparative. That is, they involve either an explicit or an implicit comparison with a particular or idealized condition or train of events. The phrase “Second Reconstruction” is based, of course, on a recognition of this logic of explanation, and the natural comparison is with the First Reconstruction, that beginning in the 1860s. Perhaps because lately so many historians seem to have lost faith in the possibility of generalization or even explanation, there have been almost no efforts to make rigorous comparisons between the First and Second American Reconstructions by those whose discipline would naturally lend itself to the comparative analysis of change over time. I offer a tentative comparison focusing on two issues: voting rights and racial discrimination in schools.

This time of a lull in the Second Redemption (the first Redemption “saved” southern whites from the first Reconstruction) is particularly opportune for such an enterprise. Progress in race relations has long since been reversed, a new ideology to justify and preserve white supremacy – a successor to “separate but equal” with the ironic name of “colorblindness” – has been developed and partially institutionalized, the principal political parties have settled down on opposite sides of nearly every issue in race relations, and a majority of the Supreme Court has taken upon itself an even more important role in bringing about the Second Redemption than it did in the First. More, no doubt, is to come, as the Supreme Court has not yet indubitably eliminated affirmative action and appears to be one judicial appointment away from declaring Sections 2 and 5 of the Voting Rights Act unconstitutional. Enough has happened, however, that trends seem clear, and the comparative absence of contemporary furor may facilitate thoughtful consideration.

Since I have treated comparative voting rights policy extensively in the first chapter of my 1999 book, *Colorblind Injustice*, I will merely summarize here what I said there. During the First Reconstruction, African-Americans lost political power not suddenly in the 1870s, but gradually beginning then, not in a single burst of violence or fraud, but in a sequence of actions, in which repeated violence and fraud, to be sure, played crucial roles, but in which laws and state constitutional amendments were necessary and decisive. In the First Reconstruction, as in the Second, vote dilution through a myriad of devices – racially discriminatory gerrymandering, the substitution of at-large for district elections, annexations and deannexations, white primaries – went along with and facilitated disfranchisement. It was these changes in institutional rules, not ideological or cultural transmogrifications or extra-legal behavior, that reshaped southern politics from the vigor of the late 19th century to the comparative torpor of the first half of the twentieth.

A few transfigurations and many small, but extremely significant incremental changes in institutional rules likewise characterized the Second Civil Rights Revolution, but this time the incremental changes in voting rights policy were progressive, rather than regressive. Until 1993, Supreme Court decisions and amendments and stringent administration of the Voting Rights Act by bipartisan majorities preserved and expanded minority voting rights, in contrast to the partisan stalemate in Congress and the incremental moves toward disfranchisement by southern

states that had taken place in the 19th century. African-American political power gradually expanded after 1965, instead of gradually diminishing, as it had from the mid-1870s to the first decade of the 20th century. Three renewals of the 1965 Voting Rights Act and many significant Supreme Court opinions smoothed the path.

Why the contrary trends? The conventional answer would simply be the decline of racism. But we are less enlightened and our 19th century predecessors, less benighted, than we often assume. After all, they abolished slavery and quickly enfranchised a mass of recently-freed and overwhelmingly illiterate slaves, writing safeguards of the vote and of equal protection into the Constitution that would probably have been impossible to pass at any other time in American history. These safeguards were so strong that it took two generations of massive, often ingenious effort to overcome them. Today, through racially unequal enforcement of drug and other laws, we disfranchise a substantial proportion of black males as felons, and through haphazard administration of needlessly complicated registration laws, we disfranchise even more of the poor, principally African-Americans and Latinos.

Instead, I suggest, the key to the contrast is that congressional districts since at least the 1950s have been drawn to make incumbents' reelection likely, thus facilitating two necessary conditions for the passage and progressive amendment of laws that protect minority rights: First, members of Congress can serve long enough terms to gauge what it takes to make such protection work, and they can then frame and fine tune laws and oversee their effective administration. Second, members are electorally secure enough to dare to side with minorities, even those who generally support the other party, in return for vote swaps on other issues, or in some instances, because of strongly-held democratic political beliefs. In the 19th century, on the other hand, vastly higher percentages of congressional districts were politically marginal, members rarely served for more than two terms, and in Congress, partisanship was all-consuming because congressmen had no time to establish working relationships across the aisle. In the late 19th century, political majorities in Congress were so fragile and changeable that no civil rights bill passed both houses after 1875 (though many swept through northern state legislatures at the time), and partisanship was so fierce that no Democratic member of Congress ever voted for a single civil rights measure after 1865.

The morals of this part of the story are that minority rights are so fragile in a democracy that incremental changes in institutions and institutional rules are essential to their realization, and that minorities need institutional stability to guarantee progressive incremental change and avoid its opposite. Instability is the enemy of minority rights.

The much less well-known story of struggles against racial discrimination in schools in the 19th century, one on which I have been working, between voting rights cases and other research, for 25 years, followed a different path, though incremental change looms just as large in its narrative. The dominant trend in 19th century racial school reform was of slow, but progressive change from exclusion to segregation, moving in nearly every northern state to widespread, legally-mandated integration. By 1901, every non-southern state with a significant number of black children except Indiana had passed a school integration law, and even without such a law, about half the African-American children in Indianapolis attended predominantly white schools during the 1890s. There were nearly 100 school racial discrimination court cases

filed in the 19th century, and it will no doubt surprise most scholars that black plaintiffs won a majority of the cases that were decided. In none of the northern and border states that I have studied intensively did African-Americans and their white allies rely wholly on the courts to accomplish their objectives. In state after state, the anti-discrimination forces coupled mass agitation – petitions, meetings, pressure on the political parties -- with campaigns for school board, legislative, and judicial action. They organized around court cases, used victories or defeats in court to press for laws and school board resolutions, and employed courts to carry out the laws. All of this took place with no central organization like the NAACP and no central planning, no corps of dedicated lawyers, and nothing like adequate financial resources, and it succeeded in substantially integrating northern “common” schools, as they were then called, largely after the textbook end of Reconstruction in 1877, when historians have generally believed there was a rising tide of white racism.

The contrast with the received narrative of school integration in the Second Reconstruction is stark. The focus of that story is largely on actions by the national government, especially the Supreme Court and various national administrations, and on the efforts of national organizations, chiefly the NAACP, to force and channel national governmental action. Until the late 1960s, it is largely a southern tale, and legislatures and school boards are forced to move not by citizens, but by courts. After a well-generated campaign to attack the enemy’s capital, the fortress falls in *Brown v. Board*, though loud counterattacks and guerrilla resistance persist for nearly two decades. Only when the war turns north does the march falter, and it is the 1990s before retreat turns to rout. Although many individual city or state struggles for equal schools have their historians, the main focus has been on the Supreme Court’s major cases, from *Brown* to *Green v. New Kent County* to *Swann* and *Milliken v. Bradley*, and finally to *Jenkins I* and *II*, and the incremental retreat has attracted less attention than the dramatic initial victories.

The Second Reconstruction’s educational struggles have been much more complicated and less geographically concentrated than those of the First, and perhaps no account can capture all of their nuances. But three contrasts that have never before, to my knowledge, been noted ought to attract more attention and puzzlement than they have, and the chief point of my presentation will be to point them out: In voting rights, incremental changes undid the First Reconstruction, while they magnified the effect of Second Reconstruction, at least until 1993. In education, on the other hand, incremental changes brought about steadily greater equality during the late 19th century, but progressive incrementalism was reversed around 1990 in the Second Reconstruction. Why were the patterns so different, and what do they say about the convention that sees racial progress or retrogression as all of a piece, driven by attitudinal trends?

The third contrast is in the role of the Supreme Court, and it focuses on three cases that I have studied very intensively (*Cumming*, *Giles*, and *Shaw*) and one that I have not (*Jenkins II*). *Cumming v. Richmond County* (1899), the first case that the U.S. Supreme Court ever decided on racial discrimination in schools, concerned the Augusta, Georgia school board’s decision to close the only public high school for blacks in the state, while it continued to subsidize two white high schools. In a unanimous opinion, three years after *Plessy v. Ferguson*, Justice John Marshall Harlan ruled that the Board’s action in providing manifestly unequal schools for African-Americans could not be overruled unless the Court decided that it was motivated by

racial hostility. Four years later, in *Giles v. Alabama*, Justice Oliver Wendell Holmes gleefully sustained the nationally notorious disfranchising state constitution of 1901, including its grandfather clause and the patently discriminatory actions of its registrars, on the grounds that voting rights constituted a “political question.” In a cynically clever taunt, Holmes remarked that to grant Jackson Giles’s prayer to register him under what Giles claimed was an invalid state constitution would be ineffectual: If it was unconstitutional, he could not be validly registered under it.

As racist and reactionary as *Cumming* and *Giles* were, however, it must be noted that they only validated the regressive actions of southern white state-sanctioned bodies. The judicial opinions did not themselves reverse progressive actions by states, Congress, or lower court judges. By contrast, in *Shaw v. Reno* (1993) and *Missouri v. Jenkins* (1995), the same five-person majority of the Supreme Court slammed the brakes on attempts to bring about more racial equality.

It may be that courts -- alone, by themselves -- cannot bring about lasting, positive racial transformation, and that in that very restrictive sense, they offer only “hollow hopes.” But as the formative crisis of the modern judicial system, the wild ride of the Four Horsemen that led to the Court-packing scheme of 1937, should have taught us, courts can bring change to a halt unless progressives successfully rally the most potent political powers. If we ask what force, what institution deconstructed the Second Reconstruction, therefore, there is one answer: a majority of the U. S. Supreme Court.